PD-0254-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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DEANA WILLIAMSON
CLERK

**NO. PD-0254-18**

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**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS**

FILED
COURT OF CRIMINAL APPEALS
10/23/2018
DEANA WILLIAMSON, CLERK

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**CRAIG DOYAL,**
**Appellee,**

**VS.**

**THE STATE OF TEXAS**

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**ON DISCRETIONARY REVIEW FROM THE NINTH COURT OF APPEALS DISTRICT OF THE STATE OF TEXAS**

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***APPELLEE'S MOTION FOR LEAVE TO FILE DOYAL'S POST-SUBMISSION LETTER BRIEF IN RESPONSE TO THE STATE PROSECUTING ATTORNEY'S BRIEF***

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Appellee Craig Doyal moves for leave to file his Appellee's Motion for Leave to File Doyal's Post-Submission Letter Brief in Response to the State Prosecuting Attorney's Brief and shows as follows:

**I.**

On October 11, 2018, the State Prosecuting Attorney filed a post-submission brief with this Court. In her brief, the State Prosecuting Attorney claimed that three misconceptions came up in oral argument.

## II.

Appellee finds it necessary to respond to the State Prosecuting Attorney's claims because the State Prosecuting Attorney introduces new theories and explanations not discussed in the State's or Appellee's briefing or oral argument. Appellee has attached to this motion his letter brief in response to the State Prosecuting Attorney's brief.

## III.

Appellee Craig Doyal requests that his motion for leave to file be granted and that the Court consider Doyal's Post-Submission Letter Brief in Response to the State Prosecuting Attorney's Brief.

Respectfully submitted,

**RUSTY HARDIN & ASSOCIATES, LLP**

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## CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of October, 2018, a true and correct copy of the foregoing Appellee's Motion for Leave to File Doyal's Post-Submission Letter Brief in Response to the State Prosecuting Attorney's Brief has been forwarded to the counsel of record listed below by electronic service.

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October 23, 2018

**Via Electronic Filing**
Texas Court of Criminal Appeals
P.O. Box 12308
Austin, Texas 78711

Re: **Craig Doyal v. State of Texas**
PD-0254-18
Appeal Cause No. 09-17-00123-CR
Trial Cause No. 16-06-07315

To the Honorable Presiding Judge and Members of the Court of Criminal Appeals:

County Judge Craig Doyal respectfully submits this Letter Brief to address the issues raised by the State's Prosecuting Attorney's Post-Submission Amicus Brief. The State Prosecuting Attorney (SPA) claims "oral argument revealed three misconceptions or questions that could have been more fully addressed had time not been a constraint." STATE'S PROSECUTING ATT'Y'S POST-SUBMISSION BRIEF AS AMICUS CURIAE (SPA BRIEF), p. 1. Although these issues were fully briefed and addressed in Appellee's Merits Brief, Judge Doyal will respond to specific points in the SPA's brief that may have muddied the waters.

**First, there is no confusion about the distinction between overbreadth and strict scrutiny.**

Appellee did not intend to discuss the academic distinctions between Free Speech theories, methodologies, and doctrines, but the SPA post-submission brief seems to demand such a discussion. According to Smolla & Nimmer's treatise on Free Speech, strict scrutiny would fall under a methodology and overbreadth would fall under a doctrine.[1] In other words, under the overbreadth doctrine, the government is prevented from regulating speech beyond what the government may legitimately proscribe and the Court may use scrutiny review to decide how far that legitimate sweep reaches. The SPA is correct that there are times when scrutiny review is exclusively used to judge speech regulation and overbreadth is not mentioned, but the two concepts are inextricably intertwined.[2]

Both overbreadth and scrutiny review require the government to be precise when penalizing its citizens. Every criminal statute targets some core criminal

[1] *See* § 2:2 "Distinguishing theory, method, and doctrine in modern free speech jurisprudence—Clarity of terminology," 1 Smolla & Nimmer on Freedom of Speech § 2:2; § 2:12 "Distinguishing theory, method, and doctrine in modern free speech jurisprudence—Heightened Scrutiny," 1 Smolla & Nimmer on Freedom of Speech § 2:12; § 6:2 Related doctrines of overbreadth, vagueness, and standardless delegation of administrative discretion, 1 Smolla & Nimmer on Freedom of Speech § 6:2.

[2] The Court in *Ex Parte Perry* did not even address the level of review that applied because the "unconstitutional applications of the statute are substantial in relation to the statute's legitimate sweep regardless of what level of scrutiny is employed." *Ex Parte Perry*, 483 S.W.3d 884, 918 n. 200 (Tex. Crim. App. 2016).

conduct covering activities that lawmakers may proscribe, including instances of unprotected speech and association. The core criminal conduct—the criminal act or *actus reus*—defines the statute's permissible scope. The Constitution, however, limits the scope of conduct that may be proscribed. *See, e.g.*, *Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971) (holding that ordinance disallowing the gathering of three or more people on the sidewalk "ma[de] a crime out of what under the Constitution cannot be a crime. It [was] aimed directly at activity protected by the Constitution."). A statute is overbroad when it reaches constitutionally protected speech or conduct or conduct which is beyond the police power of the State to regulate. *See Sawyer v. Sandstrom*, 615 F.2d 311, 318 (5th Cir. 1980) (Dade County's loitering statute was unconstitutionally overbroad because it punished essentially innocent association in violation of First Amendment association rights); *Fenster v. Leary*, 20 N.Y.2d 309, 229 N.E. 426, 428 (1967) (statute violated due process and constituted overreaching of police power because it criminalized conduct that in no way impinged on others' rights and had only tenuous connection with prevention of crime and preservation of the public order). In *Thornhill v. Alabama*, the U.S. Supreme Court discussed the impermissible scope of some criminal statutes:

> A threat like censorship is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press.
> 310 U.S. 88, 97 (1940).

The SPA was correct when she noted in her brief that "[w]here scrutiny analysis focuses on the method, overbreadth focuses on the results in practice." SPA BRIEF, p. 2. However, the SPA goes on to claim "the overbreadth doctrine does not operate differently if the statute is 'content-based'" *Id.* But of course the methodology does change when the regulation is content-based. That is exactly what *Reed v. Town of Gilbert, Arizona* says.

**Second, "content-based" is not a misleading descriptor.**

*Reed v. Town of Gilbert, Ariz.* says very clearly "government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." 135 S. Ct. 2218, 2227 (2015). Justice Thomas could not have been more clear: if you have to look at what kind of sign it is—directional, ideological, political—then it is content based restriction subject to strict scrutiny. The SPA disagrees with judges on this Court who indicated by their questions that Section 551.143 is content-based because it applies only to government officials speaking about "public business." Even though the SPA's brief

lays out support for these judges in its numerous quotations from *Reed v. Town of Gilbert, Ariz.*,[3] the SPA claims that *Reed* does not actually advocate a straight-forward rule which only requires looking at whether the law restricts speech based on its communicative content. SPA BRIEF, p. 4. The SPA reinterprets *Reed* to say that only government restriction based on "viewpoint" discrimination is content-based restriction deserving of strict scrutiny. But Justice Thomas explicitly and unequivocally shuts down that interpretation. 135 S. Ct. at 2229-30.

Under *Reed*, the test for determining whether a speech restriction is content based is not misleading at all, but the SPA's reinterpretation of Justice Thomas's *Reed* opinion certainly is. After explaining that *Reed* equates "content based" with "viewpoint based" discrimination, the SPA's brief then goes on to offer explanations for why Section 551.143 should be subject to less rigorous levels of review. Appellee's brief explained how this Court should still find Section 551.143 overly broad even under less rigorous standards of review, so Appellee will not repeat them here.

The SPA's brief claims that *Reed* did not change prior law, but then goes on to criticize the opinion for being "written more broadly than was necessary to decide

[3] SPA BRIEF, p. 4-5.

the case." SPA BRIEF, p. 9. The SPA then announces that the *Reed* Court "could have declined to determine the applicability of strict scrutiny…[b]ut the Court did not restrain itself." *Id.* at 9-10.

No. Under the *Reed* analysis articulated by Justice Thomas, the Court could not have declined to apply strict scrutiny because the law at issue was content based speech restriction and strict scrutiny applied. The SPA asks this Court to abandon Presiding Judge Kellers' reasoning, as articulated in *Ex Parte Thompson*, 442 S.W.3d 325 (2014), and affirmed by the U.S. Supreme Court in Reed, and add confusion to the meaning of "content based." *Reed* offers the judiciary and legislators alike clear guidance on what is content based, whereas the SPA's brief offers nothing but a confusing jumble of prior First Amendment jurisprudence.

**Finally, Appellee's arguments apply only to Section 551.143 not the whole of the Texas Open Meetings Act.**

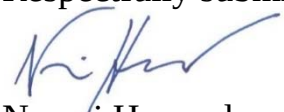
This last point of confusion in the SPA's brief is the most frustrating because it is a point that Appellee has emphasized over and over. Possibly, it is a sign of the government's weak position that it continues to laud the salutary effects of the Open Meetings Act and conflate Section 551.143 with the Act as a whole, but it is nonetheless disappointing that the SPA's brief follows in that vein. Neither the State nor the SPA are able to offer specific examples of how Section 551.143 promotes

government transparency, while numerous experts and public officials have testified that it inhibits and stultifies good governance and fails to promote transparency.

**Conclusion**

The SPA's brief quotes *New York Times v. Sullivan* and says "[t]he First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" Section 551.143 chills that "interchange of ideas" by causing confusion among government officials about when and with whom they may discuss public business. Appellee urges this Court to reject the State Prosecuting Attorney's reinterpretation of *Reed v. Town of Gilbert, Arizona* and apply the straightforward test for content based speech restrictions articulated in *Reed* by the U.S. Supreme Court and this Court in *Ex Parte Thompson*. Appellee requests this Honorable Court to reverse the decision of the Ninth Court of Appeals and uphold the trial judge's order dismissing this indictment because Texas Government Code Section 551.143 violates the First Amendment.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of October, 2018, a true and correct copy of the foregoing Doyal's Post-Submission Letter Brief in Response to the State Prosecuting Attorney's Brief has been forwarded to the counsel of record listed below by electronic service.

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